

**United States Department of Labor
Employees' Compensation Appeals Board**

U.P., Appellant

and

**U.S. POSTAL SERVICE, NORTH CARRIER
ANNEX POST OFFICE, Long Beach, CA,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-1581
Issued: April 23, 2021**

Appearances:

Roxann M. Gonzalez, for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2020 appellant, through his representative, filed a timely appeal from a May 8, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated October 15, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 8, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 5, 2019 appellant, then a 56-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a lower back injury due to factors of his federal employment, including standing, walking, lifting heavy objects, and ascending and descending stairs. He noted that he first became aware of his condition on February 16, 2019 and first realized its relationship to his federal employment on February 27, 2019. Appellant did not stop work.

In support of his claim, appellant submitted a duty status report (Form CA-17), dated April 1, 2019, from Dr. Basimah Khulusi, a Board-certified specialist in physical medicine and rehabilitation. Dr. Khulusi diagnosed lumbar spinal stenosis and listed appellant's work restrictions.

In a development letter dated April 15, 2019, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received a magnetic resonance imaging (MRI) scan of appellant's lumbar spine, dated June 25, 2018, which revealed multilevel degenerative disease in the lumbar spine with anterior degenerative spondylolisthesis, disc bulge and spurring, moderate facet arthropathy, and moderate central spinal stenosis. X-rays of appellant's lumbar spine, dated February 27, 2019, revealed mild degenerative disc disease, mild bilateral sacroiliac arthrosis, mild facet arthrosis, degenerative anterolisthesis, and moderate osseous neural foramina stenosis. An MRI scan of appellant's lumbar spine, dated March 18, 2019, revealed moderate-to-severe spinal canal stenosis at L4-5 and mild-to-moderate bilateral neuroforaminal stenosis at L4-5 and L5-S1.

In an April 1, 2019 report, Dr. Khulusi noted that appellant suffered a low back injury. She described appellant's employment activities and recounted his history of injury. Dr. Khulusi provided physical examination findings and diagnosed acceleration of degeneration of the lumbar spine, lumbar disc displacement, lumbar radiculopathies, and lumbar spinal stenosis. She noted that the repetitive bending, lifting, carrying, pushing, pulling, bending, and twisting activities of appellant's job put his back at a mechanical disadvantage because of the shift in his center of gravity. Dr. Khulusi opined that the repetitive activities caused repetitive spraining and straining of appellant's low back and caused acceleration of the degeneration of the structures of his lumbar spine. She indicated that appellant's repetitive work activities caused damage to the ligaments of the spine, causing redundancy of the ligamentum flavum and disc displacement and anterolisthesis at the L4 level. Dr. Khulusi noted that this in turn caused encroachment on the nerve roots, causing radicular symptoms, disc displacement, and moderate-to-severe canal stenosis at the L4-5 level. She further provided appellant's work restrictions.

Appellant submitted Form CA-17 reports, dated April 30 and May 29, 2019, from Dr. Khulusi, which diagnosed spinal stenosis and listed his work restrictions.

On May 9, 2019 appellant responded to OWCP's development questionnaire. He described his employment activities and noted that he did not engage in any sports or physical activity outside of work.

By decision dated July 11, 2019, OWCP denied appellant's claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed conditions and the accepted factors of his federal employment.

On July 25, 2019 appellant requested reconsideration and submitted a July 18, 2019 report from Dr. Khulusi, who diagnosed acceleration of degeneration of the lumbar spine by comparing MRI scans dated June 25, 2018 and March 13, 2019. She noted that appellant experienced worsening as evidenced by the March 13, 2019 MRI scan, which showed bilateral neural foraminal stenosis. Dr. Khulusi opined that appellant's acceleration of degeneration of his lumbar spine was caused by his repetitive work activities, which sprained the structures of the lower back, weakened the ligaments of the vertebrae, increased the stress on the lumbar discs, and displaced the discs into the spinal canal. She indicated that these pathologies caused increased encroachment on the space in the neural canal and caused appellant's conditions.

On August 5, 2019 OWCP referred appellant, along with the medical record and a statement of accepted facts (SOAF), for a second opinion examination with Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon. In a September 18, 2019 report, Dr. Ha'Eri reviewed the medical record and SOAF. He provided physical examination findings and diagnosed multilevel lumbar degenerative disc disease and spondylosis with grade 1 degenerative spondylolisthesis, central spinal canal stenosis, and bilateral neuroforaminal stenosis at the L4-5 level. Dr. Ha'Eri opined that appellant's conditions were degenerative in nature and preexisting the date of injury. He noted that the changes in appellant's lumbar spine were due to the natural aging process. Dr. Ha'Eri indicated that appellant's work activities temporarily aggravated his preexisting degenerative conditions. He noted that appellant's aggravations had returned to preinjury status by May 1, 2019 and advised that he was unable to return to full-duty work due to his preexisting degenerative condition. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Ha'Eri listed appellant's work restrictions.

By decision dated October 15, 2019, OWCP modified its July 11, 2019 decision. It noted that the weight of the medical evidence rested with the second opinion physician, Dr. Ha'Eri. OWCP, therefore, accepted appellant's claim for temporary aggravation of multi-level degenerative disc disease and spondylosis. The claim remained denied, however, for acceleration of degeneration of the lumbar spine resulting in lumbar disc displacement, lumbar radiculopathies, and lumbar spinal stenosis.

OWCP subsequently received progress reports and prescription notes from Dr. Khulusi, dated February 27, 2019 through March 31, 2020, which described appellant's subjective complaints, provided physical examination findings, and listed his treatment plan.

An electromyography (EMG) study, dated April 19, 2019, revealed no electrodiagnostic evidence of nerve entrapment or radiculopathy.

In a May 3, 2019 report, Dr. James T. Tran, a Board-certified neurosurgeon, noted that appellant had been experiencing low back pain since May 2018. He reviewed appellant's medical history and provided physical examination findings. Dr. Tran diagnosed connective tissue and disc stenosis of intervertebral foramina of the lumbar region, osseous stenosis of the neural canal

of the lumbar region, and intervertebral disc stenosis of the neural canal of the lumbar region. He noted that appellant's employment activities exerted force on his lumbar spine as he had to twist and turn his lower back while lifting tubs of mail. Dr. Tran indicated that this force caused tears in appellant's annulus fibrosus, which in turn allowed protrusion or extrusion of nucleus pulposus into the spinal canal. He further opined that appellant's extension of his lower back while bending to pick up tubs of mail caused his lumbar facet joints to disengage and separate. Dr. Tran noted that disengagement of the facet joints caused tears in appellant's annulus fibrosus and thickened his ligamentum flavum, causing spinal stenosis and compression of the lumbar nerve roots. He also opined that appellant's extension and flexion of his lower back while bending and standing up exerted force on his lumbar spine which stimulated the production of more bone tissue. Dr. Tran indicated that additional production of bone tissue in the lumbar spine results in osseous stenosis of the lumbar spinal canal. He therefore found that appellant's work activities caused his diagnosed conditions.

Appellant submitted acupuncture treatment notes dated June 28, 2019.

In an October 23, 2019 Form CA-17 report, Dr. Khulusi diagnosed spinal stenosis and listed appellant's work restrictions.

On February 10, 2020 appellant, through his representative, requested reconsideration. Appellant's representative argued that appellant had a permanent aggravation as he was still suffering from his work-related injury and his condition would not revert to his previous level of severity, as evidenced by the second opinion physician, Dr. Ha'Eri, giving him permanent work restrictions. She submitted a January 30, 2020 report from Dr. Khulusi and asserted that it, along with Dr. Tran's May 3, 2019 report, established causal relationship.

In a January 30, 2020 report, Dr. Khulusi reviewed Dr. Ha'Eri's September 18, 2019 report. She asserted that Dr. Ha'Eri's report was not well-rationalized. Dr. Khulusi noted that Dr. Ha'Eri found that appellant's temporary aggravation ceased by May 1, 2019 and returned to preinjury status, but still opined that he was unable to return to full-duty work and had permanent restrictions. She indicated that appellant had back injuries in 2005, 2010, and 2015 and was able to return to work without restrictions each time. Dr. Khulusi opined that appellant suffered cumulative trauma while working for the employing establishment. She advised that appellant's conditions were not preexisting, but developed over the years. Dr. Khulusi noted that appellant did not have a degenerative condition of his lower back prior to his federal employment.

By decision dated May 8, 2020, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128 (a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation, at any time, on his or her own motion or on application.⁴

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted

⁴ 5 U.S.C. § 8128(a); *see J.T.*, Docket No. 19-1829 (issued August 21, 2020); *W.C.*, 59 ECAB 372 (2008).

a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁶ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁷ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁸

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

In a February 10, 2020 reconsideration request, appellant's representative argued that appellant had a permanent aggravation as he was still suffering from his work-related injury and his condition would not revert to his previous level of severity, as evidenced by the second opinion physician, Dr. Ha'Eri, giving him permanent work restrictions.

The Board finds that appellant's legal argument is new and relevant to the underlying issue in this case of whether appellant's diagnosed acceleration of degeneration of the lumbar spine was caused or aggravated by the accepted factors of his federal employment.⁹ Consequently, appellant is entitled to further merit review of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).¹⁰

In support of his argument, appellant submitted a May 3, 2019 report from Dr. Tran and a January 30, 2020 report from Dr. Khulusi. In his May 3, 2019 report, Dr. Tran specifically explained with medical rationale how the accepted employment factors caused or aggravated appellant's diagnosed lumbar conditions. He described how appellant's employment activities, including repetitive lifting, loading, twisting, turning, bending, and standing caused force and disengagement in his lumbar spine, leading to his diagnosed lumbar conditions. In her January 30, 2020 report, Dr. Khulusi explained why a diagnosis of temporary aggravation of multi-level degenerative disc disease and spondylosis was not appropriate. She indicated that appellant suffered cumulative trauma while working for the employing establishment and noted her disagreement with Dr. Ha'Eri's assessment that appellant's temporary aggravation ceased by May 1, 2019, and he returned to preinjury status.

⁵ 20 C.F.R. § 10.606(b)(3); *see J.V.*, Docket No. 19-0990 (issued August 26, 2020); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁶ *Id.* at § 10.607(a); *see M.M.*, Docket No. 20-0523 (issued August 25, 2020).

⁷ *Id.* at § 10.608(a); *see M.M.*, Docket No. 20-0574 (issued August 19, 2020); *M.S.*, 59 ECAB 231 (2007).

⁸ *Id.* at § 10.608(b); *see J.V.*, *supra* note 5; *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

⁹ *See M.L.*, Docket No. 20-0605 (issued January 27, 2021).

¹⁰ *Supra* note 5.

The Board finds that Dr. Tran's May 3, 2019 report and Dr. Khulusi's January 30, 2020 report specifically addressed the deficiencies noted in OWCP's denial of appellant's claim and provided further explanation to cure those deficiencies.¹¹ Accordingly, these reports constitute relevant and pertinent new evidence in support of appellant's claim for acceleration of degeneration of the lumbar spine resulting in lumbar disc displacement, lumbar radiculopathies, and lumbar spinal stenosis. As such, appellant is entitled to further merit review of his claim based on the third above-noted requirement under 20 C.F.R. § 10.606(b)(3).¹²

The Board will, therefore, set aside OWCP's May 8, 2020 decision and remand the case for an appropriate merit decision on appellant's claim.

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 23, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *L.M.*, Docket No. 20-1185 (issued January 13, 2021).

¹² *Supra* note 5.